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11 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

12
13 OX LABS INC., a California
Corporation,

14 Plaintiff,
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16 vs.

17 BITPAY, INC., a Delaware
Corporation, and Does 1-10,
18
19 Defendants.

20 Case No. CV 18-5934-MWF(KSx)

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**PLAINTIFF OX LABS INC.'S
MEMORANDUM OF
CONTENTIONS OF FACT AND
LAW [L.R. 16-4]**

Pretrial Conf: Nov. 18, 2019
Trial: Dec. 3, 2019

Pursuant to Local Rule 16-4, the Court's Order re Jury Trial (Dkt. 22) ("Pretrial Order"), and the Court Order re BitPay, Inc.'s Motion for Summary Judgment (Dkt. 36) ("MSJ Order"), Plaintiff Ox Labs, Inc. ("Ox Labs") hereby submits this Memorandum of Contentions of Fact and Law for the jury trial scheduled to commence on December 3, 2019, in the above-entitled matter.

I. INTRODUCTION

The central question in this case is straightforward: Must the recipient of personal property mistakenly given to it return the property upon demand by the actual owner (as Plaintiff contends) or can the recipient simply send the owner what the recipient unilaterally determines to be the value of the property and refuse to return the property (as Defendant contends)? California law clearly dictates that the recipient must give the property or its equivalent back to the owner upon demand or face liability for conversion and unjust enrichment. Moreover, so long as the property remains unreturned, the violation is a *continuing* one, *i.e.*, the statute of limitations does not start to run until the property is returned to the rightful owner.

See De Vries v. Brumback, 53 Cal. 2d 643, 646-67 (1960) (In Bank).

In this case, Plaintiff Ox Labs is entitled to the return of 200 Bitcoins it mistakenly credited to Defendant BitPay, Inc. (“BitPay”). The facts supporting liability are not seriously in dispute. Ox Labs owned the 200 Bitcoins it mistakenly credited to BitPay. When it learned of the crediting error, Ox Labs demanded that BitPay return 200 Bitcoins. BitPay refused and instead sent Ox Labs a check for an amount BitPay unilaterally determined was the value of 200 Bitcoins at the time of the crediting error. Ox Labs did not cash the check and, again, demanded the return of its property. BitPay obstinately refused without any proper justification. This lawsuit followed.

Under controlling principles of California law, Ox Labs is entitled to a judgment: (1) restoring 200 Bitcoins to Ox Labs; (2) damages for the wrongful detention of the 200 Bitcoins; and (3) pre-judgment interest. Alternatively, Ox Labs may recover damages and pre-judgment interest pursuant to California Civil Code section 3336. Under California law, Ox Labs need not elect which remedy it will receive until after trial.

II. STATEMENT OF THE CASE

This is an action for conversion and unjust enrichment brought by Plaintiff Ox Labs against Defendant BitPay. Ox Labs is a California corporation that provides an advanced platform on which professionals can trade cryptocurrencies, including but not limited to Bitcoins. The platform is operated by SFOX, a wholly-owned subsidiary of Ox Labs. This memorandum will refer to Ox Labs and SFOX collectively as “Ox Labs.”

BitPay is a Bitcoin payment service provider and processor and, at the time of the relevant events in this case, had been a customer of Ox Labs trading on the SFOX platform for several years.

On July 10, 2015, in connection with a transaction, Ox Labs inadvertently over-credited 200 Bitcoins to BitPay's account. Neither Ox Labs nor BitPay realized the error at that time. In late 2016, SFOX became aware that it had 200 fewer Bitcoins in its accounts than it should have had, but, after diligently investigating, it was unable to determine the source of the discrepancy. At no time prior to February 2017 was Ox Labs aware that BitPay had received the 200 Bitcoins or aware what BitPay had done with the 200 Bitcoins.

At some time before February 2017, BitPay’s auditors noticed a discrepancy in BitPay’s accounts during an account reconciliation process. After looking further into the matter, BitPay’s controller, Kirstie Getch, suspected that the discrepancy may have been due to trading activity with Ox Labs. Ms. Getch brought the matter to the attention of BitPay’s executives, and BitPay’s executives reached out to Ox Labs for more information in February of 2017. Ox Labs looked into the issue and discovered that the error had occurred at the time SFOX was in the processing of switching to a new “wallet” system; a mix-up in Bitcoin addresses had caused the crediting error.

1 The parties negotiated how best to proceed in the weeks following BitPay's
2 disclosure of the error. BitPay offered to pay approximately \$57,000 to Ox Labs,
3 which it asserted were the proceeds of transactions in which it sold or traded the
4 200 Bitcoins it received from Ox Labs. This offer was patently unfair because the
5 Bitcoins at the time had risen in value to more than \$200,000. In addition, BitPay
6 offered no evidence that it had sold the Bitcoins or to whom or when or at what
7 price and, in any event, Ox Labs never consented to BitPay selling them. Ox Labs
8 proposed various creative business solutions to resolve the impasse, and BitPay
9 rejected each one. On May 23, 2017, Ox Labs finally demanded that BitPay simply
10 return the 200 Bitcoins, and BitPay unequivocally refused to do so on June 6, 2017.
11 On June 27, 2017, counsel for BitPay sent a letter to Ox Labs enclosing a check for
12 the approximately \$57,000 it contended it owed, which Ox Labs never accepted or
13 cashed.

14 In August and October of 2017, as a result of what is termed a "hard fork" in
15 the industry, anyone in possession of Bitcoins also received new cryptocurrencies
16 called Bitcoin Gold and Bitcoin Cash in equal amounts. In other words, by refusing
17 to return 200 Bitcoins to Ox Labs after Ox Labs' lawful demand, BitPay deprived
18 Ox Labs of 200 Bitcoin Gold and 200 Bitcoin Cash it would otherwise have
19 received. In November of 2018, Bitcoin Cash underwent a further hard fork into
20 Bitcoin SV. By the time Ox Labs filed the Complaint in this matter, the value of
21 the Bitcoins at issue had risen to \$1,324,728.

22 **III. CLAIMS AND DEFENSES [L.R. 16-4.1]**

23 This is a civil action for conversion and unjust enrichment related to BitPay's
24 refusal to return 200 Bitcoins that belong to Ox Labs. The Court has jurisdiction
25 pursuant to 28 U.S.C. § 1332 because the parties are citizens of different states and
26 the amount in controversy exceeds the jurisdictional minimum of \$75,000.

1 **A. OX LABS' CLAIMS AND ELEMENTS [L.R. 16-4.1(a), (b)]**

2 The Complaint states two claims for relief: (1) Conversion, and (2) Unjust
 3 Enrichment. Ox Labs seeks a judgment requiring BitPay to return 200 Bitcoins,
 4 200 Bitcoin Cash, and 200 Bitcoin Gold in addition to pre- and post-judgment
 5 interest and costs of suit. Alternatively, Ox Labs seeks monetary damages. *See*
 6 Complaint [Dkt. 1] ¶ 32 (Prayer for Relief).

7 **1. First Cause of Action: Conversion**

8 Summary: Ox Labs inadvertently credited BitPay 200 Bitcoins in July of
 9 2015. Those Bitcoins belonged to Ox Labs; they were given to BitPay by mistake,
 10 and they were either kept by BitPay or sold by BitPay without Ox Labs' knowledge
 11 or consent. After Ox Labs learned of the crediting error in February of 2017, Ox
 12 Labs demanded that BitPay return 200 Bitcoins to it in May of 2017. In June of
 13 2017, BitPay refused and thus became liable for converting Ox Labs' property.

14 Elements: Ox Labs has the burden of proving:

- 15 (1) That it owned or had a right to possess 200 Bitcoins;
- 16 (2) That BitPay substantially interfered with Ox Labs' 200 Bitcoins by
 17 knowingly or intentionally selling them or refusing to return them after Ox Labs
 18 demanded their return;
- 19 (3) That Ox Labs did not consent;
- 20 (4) That Ox Labs was harmed; and
- 21 (5) That BitPay's conduct was a substantial factor in causing Ox Labs' harm.

22 *See* California Civil Jury Instructions ("CACI") 2100 (2019); *Cerra v. Blackstone*,
 23 172 Cal. App. 3d 604, 609 (1985) ("Unjustified refusal to turn over possession on
 24 demand constitutes conversion even where possession by the withholder was
 25 originally obtained lawfully and of course so does an unauthorized sale.") (citations
 26 and quotations marks omitted).

1 **2. Second Cause of Action: Unjust Enrichment/Quasi-Contract**
 2 **Based on Mistake – Mistaken Receipt**

3 Summary: Ox Labs inadvertently credited BitPay 200 Bitcoins in July 2015.
 4 Those Bitcoins belonged to Ox Labs and were given to BitPay by mistake. When
 5 Ox Labs was advised in February 2017 that BitPay had received the 200 Bitcoins,
 6 Ox Labs demanded that BitPay return 200 Bitcoins, but BitPay refused to return
 7 them.

8 Elements: Ox Labs has the burden of proving:

- 9 (1) That Ox Labs deposited 200 Bitcoins into BitPay's account by
 10 mistake;
- 11 (2) That BitPay did not have a right to the 200 Bitcoins;
- 12 (3) That Ox Labs asked BitPay, Inc. to return the 200 Bitcoins;
- 13 (4) That BitPay has not returned the 200 Bitcoins to Ox Labs; and
- 14 (5) The amount of money that BitPay must pay, or property that it must
 15 return, to Ox Labs to restore Ox Labs to its former position.

16 *See CACI 374; Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir.
 17 2015) (unjust enrichment claim will lie when the defendant "has been unjustly
 18 conferred a benefit through mistake, fraud, coercion, or request. The return of that
 19 benefit is the remedy 'typically sought in a quasi-contract cause of action.'")
 20 (quoting 55 Cal. Jur. 3d Restitution § 2); *Munoz v. MacMillan*, 195 Cal. App. 4th
 21 648, 661 (2011) ("Common law principles of restitution require a party to return a
 22 benefit when the retention of such benefit would unjustly enrich the recipient; a
 23 typical cause of action involving such remedy is 'quasi-contract.'") (citing *McBride*
 24 *v. Boughton*, 123 Cal. App. 4th 379, 388-389 (2004)); *Federal Deposit Ins. Corp. v.*
 25 *Dintino*, 167 Cal. App. 4th 333, 346 (2008) ("Whether termed unjust enrichment,
 26 quasi-contract, or quantum meruit, the equitable remedy of restitution when unjust
 27 enrichment has occurred is an obligation (not a true contract) created by the law

1 without regard to the intention of the parties, and is designed to restore the
2 aggrieved party to his or her former position by return of the thing or its equivalent
3 in money.”) (internal quotations marks and citation omitted).

4

5 **B. EVIDENCE IN SUPPORT OF OX LABS’ CLAIMS [L.R. 16-
6 4.1(c)]**

7 **1. First Cause of Action: Conversion**

8 Ox Labs will introduce the following categories of evidence establishing that
9 BitPay is liable for conversion:

- 10 • Evidence that BitPay received 200 Bitcoins from Ox Labs in error in
11 July 2015;
- 12 • Evidence that the 200 Bitcoins belonged to Ox Labs and BitPay had no
13 right to the Bitcoins;
- 14 • Evidence that when the error was discovered, Ox Labs asked BitPay to
15 return its 200 Bitcoins and BitPay refused to return them;
- 16 • Evidence that Ox Labs was harmed by BitPay’s refusal to return 200
17 Bitcoins;
- 18 • Evidence that BitPay has at all relevant times possessed 200 Bitcoins
19 to return to Ox Labs; and
- 20 • Evidence of the value of 200 Bitcoins (and the hard fork benefits) on
21 various material dates from July 2015 until trial.

22 **2. Second Cause of Action: Unjust Enrichment**

23 Ox Labs will introduce the following categories of evidence establishing that
24 BitPay has been unjustly enriched:

- 25 • Evidence that when the error was discovered, Ox Labs asked BitPay to
26 return its 200 Bitcoins and BitPay refused to return them;

- 1 • Evidence that Ox Labs was harmed by BitPay's refusal to return 200
2 Bitcoins;
- 3 • Evidence that BitPay cannot prove in which transactions it allegedly
4 sold Ox Labs' Bitcoins or for how much or whether the proceeds were
5 invested in additional Bitcoins;
- 6 • Evidence that BitPay has 200 Bitcoins to return to Ox Labs;
- 7 • Evidence of the value of 200 Bitcoins (and the hard fork benefits) on
8 various material dates from July 2015 until trial.

10 **C. SUMMARY OF BITPAY'S AFFIRMATIVE DEFENSES [L.R.
11 16-4.1(d), (e)]**

12 As a preliminary matter, BitPay asserts approximately ten "affirmative
13 defenses," categorized into 6 numbered paragraphs, many of which are not proper
14 affirmative defenses. *See* Defendant BitPay's Answer and Affirmative Defenses
15 [Dkt. 13] at 5. Several of these affirmative defenses simply purport to negate
16 elements of Ox Lab's claims for relief, are arguments of law about the claims, or
17 are otherwise encompassed by other affirmative defenses. *See, e.g.*, Affirmative
18 Defense No. 2. ("Unavailability of a claim for unjust enrichment where there is an
19 adequate remedy at law."); No. 4 ("BitPay no longer has the bitcoin at issue to
20 return."); No. 5 ("California Code 3336 . . . states the remedy for conversion.");
21 No. 3 ("BitPay unconditionally tendered 100% of the profit it earned as a result of
22 Ox Labs' error"). Because Ox Labs must establish elements of its causes of action
23 to prove its claims, these are not proper affirmative defenses. Moreover, BitPay has
24 not provided counsel for Ox Labs with proposed jury instructions for any of these
25 purported affirmative defenses, save the statute of limitations, as required by the
26 Court's Pretrial Order and the Civil Local Rules. Finally, BitPay's Affirmative
27
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1 Defense No. 1 (“Failure to State a Claim for Relief”) is not an affirmative defense
 2 at all, and, in any event, the time for pleading motions has long since passed.
 3

4 The only affirmative defense BitPay will apparently attempt to prove is its
 5 statute of limitations defense, which wholly lacks merit under the circumstances of
 6 this case.

7 **1. Affirmative Defense: Statute of Limitations**

8 Summary: BitPay asserts that a two-year statute of limitations applies to Ox
 9 Labs’ claim for conversion on the ground that Bitcoin is intangible property.

10 Elements: If the Court determines that the conversion claim is subject to a
 11 two-year statute of limitations, then BitPay must establish: (1) That Ox Labs’ cause
 12 of action accrued before July 6, 2016 (*i.e.*, two years before the filing of the
 13 Complaint). If BitPay establishes that fact, then Ox Labs must establish that before
 14 July 6, 2016, it did not discover and did not know of facts that would have caused a
 15 reasonable person to suspect BitPay’s unauthorized sale of the 200 Bitcoins, and
 16 Ox Labs was not negligent in failing to make the discovery prior to July 6, 2016.
 17 *See Sun ‘n Sand, Inc. v. United California Bank*, 21 Cal. 3d 671, 701–702 (1978).

18 **D. EVIDENCE IN OPPOSITION TO BITPAY’S AFFIRMATIVE
 19 DEFENSES [L.R. 16-4.1(f)]**

20 **1. Affirmative Defense: Statute of Limitations**

21 Ox Labs will present the following categories of evidence:

- 22 • Testimony from Ox Labs employees that Ox Labs did not know of the
 23 error before February 2017, when BitPay alerted Ox Labs that it had
 24 received 200 more Bitcoins than it should have received in its accounts
 25 from transactions dating back to July 2015;
- 26 • Testimony from Ox Labs employees that Ox Labs maintained
 27 reasonable business practices with respect to monitoring its accounts
 28 and investigating discrepancies;

- 1 • Testimony from Ox Labs employees that Ox Labs' reasonable
2 business practices did not lead, and could not have led, it to discover
3 that the 200 Bitcoin discrepancy was attributable to BitPay or that
4 BitPay had sold or otherwise disposed of the 200 Bitcoins, before July
5 6, 2016;
- 6 • Testimony and documents demonstrating that BitPay refused to return
7 Ox Labs' property in June 2017 and has refused continually since then,
8 i.e., the claim for conversion still has not accrued pursuant to *De Vries*
9 *v. Brumback*, 53 Cal. 2d 643, 646-67 (1960) (In Bank) and its progeny.

11 **2. Questions of Law Regarding Statute of Limitations**

12 Continuing Violation: Neither the Court nor a jury need embark upon the
13 cumbersome and complex statute of limitations analysis that BitPay has proposed.
14 As a threshold matter, California law, as interpreted by various federal courts,
15 makes clear that the statute of limitations on a claim for conversion *does not even*
16 *start to run* if the plaintiff has demanded return of the property at issue and the
17 defendant has not returned it. As the California Supreme Court has decisively
18 stated: “Conversion is act of willful interference with a chattel, done without
19 lawful justification, by which any person entitled thereto is deprived of use and
20 possession. Furthermore, *it is a continuing tort—as long as person entitled to use*
21 *and possession of his property is deprived thereof*; it does not necessarily end when
22 original wrongdoer transfers physical possession to another.” *De Vries v.*
23 *Brumback*, 53 Cal. 2d 643, 646-67 (1960) (In Bank) (emphasis added).

24 Federal courts have repeatedly followed *De Vries* in holding that refusal to
25 return property after a lawful demand prolongs the violation until the property is
26 actually returned:

27 When a person who wrongfully possesses a piece of property fails to
28 comply with a lawful demand for that property, the wrongful possessor's

failure to comply with the lawful demand constitutes conversion. The conversion does not end at the moment a lawful demand is refused, it continues as long as the person entitled to the use and possession of his property is deprived thereof. The conversion continues from the time the first lawful demand is refused until the lawful owner regains possession of his property.

Matson v. Vorhariwatt (In re Vorhariwatt), 17-cv-1255-WQH-MDD, 2017 U.S. Dist. LEXIS 208560, at *9-10 (S.D. Cal. Dec. 18, 2017) (citations and internal punctuation omitted). *See also Hullinger v. Anand*, No. CV 15-07185 SJO (FFMx), 2016 U.S. Dist. LEXIS 111918, at *10 (C.D. Cal. Aug. 11, 2016) (“California law treats conversion, fraud, and constructive fraud similarly with respect to the theory of ongoing liability.”); *AB Inv. LLC v. Regal One Corp.*, No. CV 09-02983-RGK (FFMx), 2009 U.S. Dist. LEXIS 135956, at *3-4 (C.D. Cal. Dec. 22, 2009) (“[C]onversion is a continuing tort as long as the person entitled to the use and possession of his property is deprived thereof and does not necessarily end when the original wrongdoer transfers physical possession to another.”) (citations and internal punctuation omitted).

In this case, it is undisputed that Ox Labs demanded the return of 200 Bitcoins on May 27, 2017. BitPay refused that demand on June 6, 2017, and it has not returned possession of the property to this day. Accordingly, *De Vries* and its progeny dictate that the violation continues and, as a result, the statute of limitations has not even begun to run in this matter. Even if the continuing violation doctrine did not apply, however, the date of conversion in this matter would be the date on which BitPay refused to return the property, *i.e.*, June 6, 2017, which is less than either two or three years before the filing of the Complaint on July 6, 2018. *See Bufano v. San Francisco*, 233 Cal. App. 2d 61, 70 (1965) (“Where an original taking is wrongful, the bar of the statute runs from the time of the unlawful taking, but where the original taking is lawful, *the statute is not set in motion until the return of the property has been demanded and refused or until a repudiation of the owner’s title is clearly and unequivocally brought to his*

1 attention.”) (emphasis added). The statute of limitations defense therefore fails as a
 2 matter of law.

3 The Discovery Rule

4 The Court has already held that California’s discovery rule -- which delays
 5 the accrual of a cause of action until the plaintiff becomes aware of facts giving rise
 6 to the claim -- applies to both the conversion and unjust enrichment causes of
 7 action. *See* MSJ Order at 7 (applying discovery rule to conversion claim and citing
 8 *Federal Deposit Ins. Corp. v. Dintino*, 167 Cal. App. 4th 333, 349-350 (2008));
 9 MSJ order at 8 (applying discovery rule to unjust enrichment claim and quoting
 10 *Dintino*, 167 Cal. App. 4th at 350 [“The Legislature has expressly provided for
 11 application of the discovery rule to causes of action based on mistake, such as
 12 Bank’s unjust enrichment cause of action in this case.”]). The Court was correct in
 13 both instances and should instruct the jury accordingly, assuming that the
 14 continuing violation doctrine does not dispose of the defense, as demonstrated
 15 above. BitPay’s cited authority generally holding that the statute of limitations
 16 begins to run on the date the wrongful act or omission occurred, regardless of the
 17 plaintiff’s knowledge, are inapposite because those cases involved a wrongful
 18 disposition of property (e.g., theft) whereas in this case BitPay did not obtain the
 19 property wrongfully but instead wrongfully refused to return the property after a
 20 lawful demand. That refusal took place well within either a two or three statute of
 21 limitations, and there is no question that Ox Labs could not have learned of the
 22 refusal any earlier.

23 Tangible v. Intangible Property Rights: The statute of limitations for a claim
 24 for conversion is generally three years. Cal. Code Civ. Proc. § 338(c). However,
 25 BitPay contends that the conversion of “intangible” property is governed by a two-
 26 year statute of limitations. *See* Cal. Code Civ. Proc. § 339; *OC Kickboxing & Mixed*

1 *Martial Arts, Inc. v. Warrior Arts All., Inc.*, No. SACV19-0004-DOC (DFMx),
 2 2019 WL 3210093, at *4 (C.D. Cal. May 3, 2019).

3 No controlling authority addresses the issue of whether Bitcoin is tangible or
 4 intangible property for purposes of California law of conversion. However, the
 5 reasoning of the most germane cases, *Fabricon Prods. v. United California Bank*,
 6 265 Cal. App. 2d 113 (1968), and *Italiani v. Metro-Goldwyn-Mayer Corp.*, 45 Cal.
 7 App. 2d 464 (1941), demonstrates that Bitcoin is not the type of intangible property
 8 subject to the narrower two-year statute of limitations.

9 In *Fabricon*, the Court of Appeal held that a claim for specific recovery of
 10 personal property (a check for money in that instance) is subject to the three-year
 11 statute of limitations of Code of Civil Procedure section 338(c) (formerly Code of
 12 Civil Procedure section 388, subdivision 3). *See* 265 Cal. App. 2d at 117. The
 13 Court distinguished the case at bar from those involving “intangible property
 14 rights” such as *Italiani*, which concerned “plagiarism of a motion picture scenario.”
 15 *Id.* (citing *Italiani*, 45 Cal. App. 2d at 466-67) (two-year statute of limitations under
 16 § 339 applies to “intangible incorporeal rights [that] exist separate and apart from
 17 the property in the paper on which it is written, or the physical substance in which it
 18 is embodied.”)).

19 In *Italiani*, a plaintiff wrote an idea for a movie scenario on a piece of paper,
 20 sent it to the defendant, and later accused the defendant of stealing his idea and
 21 using it for a movie. The appellate court trained its focus on the fact that the
 22 plaintiff was seeking compensation for the “idea” that was stolen (*i.e.*, the
 23 incorporeal right) rather than the paper on which the idea was written, and thus the
 24 two-year statute of limitations for intangible property applied rather than the usual
 25 three-year statute. That pivotal distinction is inapplicable in the instant case
 26 because Bitcoin (*i.e.*, a commodity with hard monetary value) is not merely an
 27 “idea” divorceable from the paper on which it is written or, rather, the blockchain

on which it is recorded. This is why the few courts to have considered the nature of Bitcoins have concluded that they are commodities subject to regulation by the Commodities Futures Trading Commission and other federal agencies. *See CFTC v. McDonnell*, 287 F. Supp. 3d 213, 228-29 (E.D.N.Y. 2018) (Bitcoin can be regulated as a commodity by the CFTC or as a security by other regulatory agencies); *id.* at 218 (“Virtual currencies are generally defined as ‘digital assets used as a medium of exchange.’ . . . They are often described as ‘cryptocurrencies’ because they use ‘cryptographic protocols to secure transactions . . . recorded on publicly available decentralized ledgers,’ called ‘blockchains.’ . . . They have some characteristics of government paper currency, commodities, and securities. . . . ‘It is a lot like gold, in fact. The difference [] is that it is digital rather than a heavy, unwieldy object. That means that it could serve the same purposes as gold in terms of a currency, but much more efficiently because it does not have any mass and can be sent easily from place to place.’ ”) (citations omitted).

As *Italiani* explained:

[CCP § 338] seeks to prescribe a [three-year] statute of limitation for those actions which may be classed broadly under the head of the common law actions of trover, detinue and replevin – and with the latter’s statutory counterpart of claim and delivery. All of these actions involve the concept of interference with the possession of, or damage to, some specific tangible property, and are not concerned with intangible or incorporeal rights which may exist in connection with, *or entirely apart from any particular piece of physical property*.

Italiani, 45 Cal. App. 2d at 467 (emphasis added). Bitcoins do not exist in some detached realm of ideas. They are digital currencies with a sophisticated system of digital recording and verification. *See Symphony FS, Ltd. v. Thompson*, No. 5:18-cv-3904, 2018 U.S. Dist. LEXIS 214641, at *1 n.1 (E.D. Pa. Dec. 20, 2018) (Bitcoin “operates using blockchain technology, a shared public ledger reinforced by cryptography which records all confirmed transactions. . . . Bitcoin wallets keep a secret piece of data called a private key or seed, which is used to sign

1 transactions. This signature both prevents the transaction from being altered once it
 2 has occurred and allows the transacting parties to remain anonymous, as only the
 3 signatures are recorded in the public log.”) (citation omitted). Accordingly,
 4 conversion of Bitcoins should be subject to the three-year statute of limitations
 5 under Civil Procedure Code section 338(c) and not the two-year statute of
 6 limitations of Civil Procedure Code section 339 applicable only to intangible
 7 property such as movie ideas.

8 **D. THIRD PARTY ISSUES [L.R. 16-4.1(g)]**

9 There are no third-parties or third-party issues in this matter.

10 **E. ANTICIPATED EVIDENTIARY ISSUES [L.R. 16-4.1(h)]**

11 Ox Labs is concurrently filing Motions *in Limine*. As reflected in those
 12 Motions, Ox Labs contends that the following evidence is inadmissible:

- 13 • Evidence (documentary or testimonial) regarding settlement
 communications between the parties leading up to and during the
 pendency of litigation. These communications are all subject to
 Federal Rule of Evidence 408, which makes such communications
 inadmissible to prove or disprove the validity or amount of a disputed
 claim or to impeach by a prior inconsistent statement or contradiction.
 Fed. R. Evid. 408 (Compromise Offers and Negotiations). To the
 extent non-settlement communications are reflected in the same
 documents and settlement communications, the inadmissible portions
 should be redacted.
- 14 • Testimony regarding BitPay’s “innocence” or “good faith” regarding
 its intent to convert, keep, or sell Ox Labs’ Bitcoins. Conversion is a
 strict liability tort and BitPay’s state of mind is irrelevant. *See Los*
 Angeles Federal Credit Union v. Madatyan, 209 Cal. App. 4th 1383,
 1387 (2012) (“Conversion is a strict liability tort. The foundation of

1 the action rests neither in the knowledge nor the intent of the
 2 defendant. Instead, the tort consists in the breach of an absolute duty;
 3 the act of conversion itself is tortious. Therefore, questions of the
 4 defendant's good faith, lack of knowledge, and motive are ordinarily
 5 immaterial.”)

- 6 • Evidence related to BitPay no longer possessing the 200 Bitcoins at
 7 issue and the contention that BitPay can no longer return the Bitcoins.
 8 See, e.g., *Pilch v. Milikin*, 200 Cal. App. 2d 212, 224 (1962) (“[I]t is
 9 immaterial that the property in question may be in the actual
 10 possession of a third party.”); *Kessinger v. Organic Fertilizers, Inc.*,
 11 151 Cal. App. 2d 741, 754 (1957) (same).

12

13 **F. IDENTIFIED ISSUES OF LAW [L.R. 16-4.1(i)]**

14 Several of the issues to be tried are similar to the issues heard on BitPay’s
 15 Motion for Summary Judgment, which was denied in its entirety. The remaining
 16 issues support Ox Labs’ position. Ox Labs anticipates the following issues of law:

17 First, whether BitPay is liable for conversion based on its refusal to return
 18 200 Bitcoins that Ox Labs owned and had the legal right to possess. Ox Labs
 19 believes that the factual basis for this claim has already been established via
 20 admissions made by BitPay throughout the course of litigation. BitPay’s contention
 21 that it is an “innocent” recipient and “did nothing wrongful” to support a conversion
 22 claim fail to recognize that, under California law, the recipient of mistakenly given
 23 property is obligated to return the property upon rightful demand. There is nothing
 24 “innocent” about keeping someone’s property when they ask for it back. See *Cerra*
 25 *v. Blackstone*, 172 Cal. App. 3d 604, 609 (1985) (“Unjustified refusal to turn over
 26 possession on demand constitutes conversion even where possession by the
 27 withholder was originally obtained lawfully”) (citations omitted). Moreover, even

1 if BitPay's contention that it sold the Bitcoins at issue and "zeroed out" its holdings
 2 were true, a claim unsupported by any evidence produced in this litigation, then it is
 3 undisputed that such sale was "unauthorized" and therefore also a conversion. *See*
 4 *id.* ("unauthorized sale" of personal property obtained lawfully also constitutes
 5 conversion) (citing *Wade v. Markwell & Co.*, 118 Cal. App. 2d 410, 418 (1953);
 6 *Alonso v. Badger*, 58 Cal. App. 2d 752, 758 (1943)).

7 *Second*, the available remedies for BitPay's conversion of Ox Labs' 200
 8 Bitcoins. Ox Labs seeks specific recovery of its property for conversion. *See*
 9 *Minsky v. L.A.*, 11 Cal. 3d 113, 121 (1974) ("Where a wrongdoer has converted . . .
 10 personal property, the injured owner must elect between his right of ownership and
 11 possession (with the remedy of specific recovery) and his right to compensation
 12 (with the remedies of damages for conversion or quasi-contract recovery of value
 13 on theory of waiver of tort.") (*citing* 2 Witkin, *Cal. Procedure* (2d ed. 1970)
 14 Actions, § 114, p. 983) (emphasis added); *Flores v. Cal. Dep't of Corrections and*
 15 *Rehabilitation*, 224 Cal. App. 4th 199, 206 (2014), *review denied*, (Apr. 30, 2014)
 16 ("Available remedies for conversion include specific recovery of property with
 17 damages for its detention and damages based on the value of the property.") (*citing*
 18 Cal. Civ. Code §§ 3336, 3379; *Allstate Leasing Corp. v. Smith*, 238 Cal. App. 2d
 19 128, 132-133 (1965)).

20 BitPay contends that the sole remedy for conversion is damages based on the
 21 market value of the Bitcoins on July 10, 2015, the date of the crediting error.
 22 However, Ox Labs contends that § 3336 sets forth the compensatory damages
 23 remedy for conversion, whereas Ox Labs seeks, in the first instance, the remedy of
 24 specific recovery, as authorized by the authority cited above. In the alternative, Ox
 25 Labs seeks damages under § 3336. Even under the standard measure of damages
 26 allowed by that statute, Ox Labs contends that the date of conversion would be the
 27 date that BitPay refused to return the property after a lawful demand. That date is
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1 not July 10, 2015, when the property first passed into BitPay’s possession, but
 2 rather June 6, 2017, when BitPay refused to return 200 Bitcoins to Ox Labs. See
 3 *Bufano v. San Francisco*, 233 Cal. App. 2d 61, 70 (1965) (“Where an original
 4 taking is wrongful, the bar of the statute runs from the time of the unlawful taking,
 5 but where the original taking is lawful, *the statute is not set in motion until the
 6 return of the property has been demanded and refused* or until a repudiation of the
 7 owner’s title is clearly and unequivocally brought to his attention.”) (emphasis
 8 added).

9 BitPay further contends that it no longer possesses the Bitcoins that it was
 10 erroneously credited and therefore cannot be subject to an order of restitution or
 11 specific recovery. This contention is fallacious. *See, e.g., Pilch v. Milikin*, 200 Cal.
 12 App. 2d 212, 224 (1962) (“[I]t is immaterial that the property in question may be in
 13 the actual possession of a third party.”); *Kessinger v. Organic Fertilizers, Inc.*, 151
 14 Cal. App. 2d 741, 754 (1957) (same).

15 BitPay’s repeated assertion that Ox Labs has failed to establish any
 16 “connection” between its current Bitcoin holdings and the violation at issue
 17 completely misses the point; once Ox Labs establishes that it mistakenly gave the
 18 Bitcoins to BitPay and BitPay refused to return them upon demand, facts that are
 19 undisputed here, then liability is established pursuant to the case cited above. The
 20 only question remaining is what BitPay must provide to redress the wrong. Despite
 21 its protestations to the contrary, BitPay *can be* ordered to restore 200 Bitcoins to Ox
 22 Labs without them being the precise Bitcoins BitPay received – otherwise a
 23 recipient of mistakenly given property could simply sell the property immediately
 24 and, when subject to a demand, claim it cannot be returned (if the value rose) or
 25 return an identical item (if the value declined). The law does not enable such
 26 gamesmanship. Similarly, the weight of modern authority allowing the return of
 27 money mistakenly provided does not require that the exact same dollar bills to be
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1 restored be traced back to the transaction. *See Welco Electronics, Inc. v. Mora*, 223
 2 Cal. App. 4th 202, 209 (2014) (“Money may be the subject of conversion if the
 3 claim involves a specific, identifiable sum; it is not necessary that each coin or bill
 4 be earmarked.”) (citing *Haigler v. Donnelly* 18 Cal. 2d 674, 681 (1941)).

5 BitPay’s contention that it can only be ordered to restore the exact same
 6 property that Ox Labs mistakenly provided is incorrect for a further reason.
 7 Bitcoins are “fungible” – *i.e.*, they are a medium of exchange – and one Bitcoin is
 8 the same as any other in all material respects. *See Horn v. Klatt*, 65 Cal. App. 2d
 9 510, 521 (1944) (“[W]here the subject matter consists of chattels or choses in action
 10 which are identical in kind and quality with other chattels or choses in action,
 11 restitution may be made by giving other things of the same kind and quality.”). No
 12 court would bar an action for restitution under the Unfair Competition Law,
 13 Business & Professions Code § 17200, because the defendant no longer possessed
 14 the precise dollar bills it wrongly acquired. Further, it makes no difference whether
 15 the value of those dollars has risen or fallen with respect to other currencies –
 16 Courts simply award the same amount of dollars. BitPay has conceded in discovery
 17 that it had more than 200 Bitcoins at every moment relevant to this case that it
 18 could restore to Ox Labs. It should not be immune from the remedies of restitution
 19 and specific recovery simply because it sold the Bitcoins Ox Labs provided and
 20 bought others with the proceeds or because the value of the Bitcoins as measured
 21 against a different currency have fluctuated.

22 *Third*, BitPay asserts that the conversion cause of action is barred by a two-
 23 year statute of limitations because Bitcoins should be considered intangible
 24 property within the meaning of Civil Procedure Code § 339. Ox Labs contends
 25 that, per the California Supreme Court’s opinion in *De Vries*, discussed above, the
 26 statute of limitations has not even started to run in this matter. Even if that is not
 27 the case, the statute of limitations started to run upon BitPay’s refusal to return the
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1 property, not when it first received it. *See Bufano v. San Francisco*, 233 Cal. App.
 2d 61, 70 (1965) (“Where an original taking is wrongful, the bar of the statute runs
 3 from the time of the unlawful taking, but where the original taking is lawful, *the*
 4 *statute is not set in motion until the return of the property has been demanded and*
 5 *refused* or until a repudiation of the owner’s title is clearly and unequivocally
 6 brought to his attention.”) (emphasis added). Finally, the normal three-year statute
 7 of limitations for conversion claims should apply pursuant to § 338(c), as
 8 demonstrated *supra* at pp.12-15.

9 Fourth, whether Ox Labs is entitled to pursue “special damages” under Cal.
 10 Civ. Code § 3336. If the jury determines that an award of the value of the property
 11 at the time of conversion plus interest would be “manifestly unjust,” it may award
 12 damages under the second prong of § 3336. *Myers v. Stephens*, 233 Cal. App. 2d
 13 104, 116 (1965). “[W]here proof establishes an injury beyond that which would be
 14 adequately compensated by the value of the property and interest, the court may
 15 award such amounts as will indemnify for all proximate reasonable loss caused by
 16 the wrongful act.” *Lint v. Chisholm*, 121 Cal. App. 3d 615, 624–625 (1981)
 17 (internal citations omitted). “In exceptional circumstances, to avoid injustice, loss
 18 of profits may be the measure.” *Newhart v. Pierce*, 254 Cal. App. 2d 783, 794
 19 (1967) (internal citation omitted).

20 Here, due to the sharp rise in value of Bitcoins and the hard fork benefits that
 21 followed after BitPay refused to return Ox Labs’ Bitcoins, Ox Labs lost far more
 22 than the fair market value of the Bitcoins on the date when BitPay asserts it sold
 23 them. As the citations above demonstrate, when a plaintiff offers evidence that he
 24 or she lost profits in excess of the value-on-date-of-conversion-plus-interest
 25 measure, the “manifest injustice” standard has been satisfied. *See Myers v.*
 26 *Stephens, supra*, 233 Cal. App. 2d at 119-120 (plaintiff offered evidence of lost
 27 profits and appellate court affirmed, stating “[w]e are satisfied that there were

1 special circumstances in the present case which required a different measure of
 2 damages to be applied than that provided under the first alternative"); *see also*
 3 *Betzer v. Olney*, 14 Cal. App. 2d 53, 61 (1936) (special circumstances required
 4 different measure of damages where plaintiff testified that he did not intend to sell
 5 stock at issue and the price rose thereafter); *Ruiz v. Bank of Am. Nat'l Tr. & Sav.*
 6 *Assoc.*, 135 Cal. App. 2d Supp. 860, 862 (1955) (applying second prong of § 3336
 7 where circumstances indicated that plaintiff had relied on directions of defendant
 8 not to make required payments for automobile and defendant sold it).

9 Finally, as a general matter under California law, "[t]he selection of which
 10 measure of damages to apply is within the sound discretion of the trier of fact."
 11 *GHK Assocs. v. Mayer Group*, 224 Cal. App. 3d 856, 874 (1990).

12 *Fifth*, BitPay contends that Ox Labs cannot pursue equitable relief (*i.e.*,
 13 restitution or specific recovery of property) when it has an adequate remedy at law
 14 (*i.e.*, damages under Civil Code § 3336). This argument is flatly contradicted by
 15 controlling California cases. "Where a wrongdoer has converted . . . personal
 16 property, the injured owner must elect between his right of ownership and
 17 possession (with the remedy of specific recovery) and his right to compensation
 18 (with the remedies of damages for conversion or quasi-contract recovery of value
 19 on theory of waiver of tort)." *Minsky v. L.A.*, 11 Cal. 3d 113, 121 (1974) (citing 2
 20 Witkin, Cal. Procedure (2d ed. 1970) Actions, § 114, p. 983.); *See also Flores v.*
 21 *California Department of Corrections and Rehabilitation*, 224 Cal. App. 4th 199,
 22 206 (2014), *review denied*, (Apr. 30, 2014) ("Available remedies for conversion
 23 include specific recovery of property with damages for its detention and damages
 24 based on the value of the property.") (citing Cal. Civ. Code §§ 3336, 3379; *Allstate*
 25 *Leasing Corp. v. Smith*, 238 Cal. App. 2d 128, 132-133 (1965)).

26 Although a conversion plaintiff must eventually choose which remedy to
 27 pursue, that determination need not be made before the case is tried. "Ordinarily a
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plaintiff need not elect, and cannot be compelled to elect, between inconsistent remedies during the course of trial prior to judgment.” *Roam v. Koop*, 41 Cal. App. 3d 1035, 1039 (1974); *see also Jahn v. Brickey*, 168 Cal. App. 3d 399, 406 (1985) (rejecting argument that election of remedies must be made prior to submission of case to jury).

Sixth, if Ox Labs prevails on either its claim for conversion or unjust enrichment, it will be entitled to prejudgment interest. Whichever date is established for the conversion, Ox Labs will be entitled to an award of prejudgment interest of 7% per annum from that date to the date when judgment is entered. *See Moreno v. Greenwood Auto Ctr.*, 91 Cal. App. 4th 201, 209 (2001); *Pacific-Southern Mortg. Trust Co. v. Ins. Co. of N Am.*, 166 Cal. App. 3d 703, 716 (1985); *State Farm Mut. Auto. Ins. Co. v. Rodriguez (In re Rodriguez)*, 568 B.R. 328, 347 (2007). BitPay appears to contend that prejudgment interest cannot be awarded because BitPay “tendered” an amount that it deemed sufficient to redress the harm at issue here. That assertion is undeniably incorrect given controlling U.S. Supreme Court authority holding that an unaccepted offer is a “legal nullity.” *Campbell-Ewald Co. v. Gomez*, 577 U.S. ___, 136 S. Ct. 663, 670 (2016).

G. BIFURCATION OF ISSUES [L.R. 16-4.3]

There are no issues that need bifurcation in this matter.

H. JURY TRIAL [L.R. 16-4.4]

Both parties made timely demands for jury trial. The following issues are triable to the jury:

1. Conversion under California law. *See* CACI 2100 et seq.; *Union Oil Co. v. Hane*, 27 Cal. App. 2d 106 (1938) (reversing judgment on conversion claim on ground that plaintiff was entitled to a trial by jury and had not waived the right by filing the jury trial demand too late).

1 2. Unjust enrichment/quasi-contract under California law. *See*
 2 CACI 347; *McBride v. Boughton*, 123 Cal. App. 4th 379, 388 (2004)
 3 (“For example, restitution may be awarded. . . where the defendant
 4 obtained a benefit from the plaintiff by fraud, duress, conversion, or
 5 similar conduct. In such cases, the plaintiff may choose not to sue in
 6 tort, but instead to seek restitution on a quasi-contract theory (an
 7 election referred to at common law as ‘waiving the tort and suing in
 8 assumpsit’). . . . In such cases, where appropriate, the law will imply a
 9 contract (or rather, a quasi-contract), without regard to the parties’
 10 intent, in order to avoid unjust enrichment.”) (citations and internal
 11 quotation marks omitted); *Federal Deposit Ins. Corp. v. Dintino*, 167
 12 Cal.App.4th 333, 346 (2008) (“Whether termed unjust enrichment,
 13 quasi-contract, or quantum meruit, the equitable remedy of restitution
 14 when unjust enrichment has occurred is an obligation (not a true
 15 contract) created by the law without regard to the intention of the
 16 parties, and is designed to restore the aggrieved party to his or her
 17 former position by return of the thing or its equivalent in money.”)
 18 (internal quotations marks and citation omitted); *Jogani v. Superior*
 19 *Court*, 165 Cal. App. 4th 901 (2008) (claims formerly sounding in
 20 assumpsit, such as those based on quasi-contract, are actions at law
 21 with a right to trial by jury).

22 3. BitPay’s statute of limitations affirmative defense. *See Jefferson*
 23 *v. County of Kern*, 98 Cal. App. 4th 606, 619 (2002) (plaintiff has right
 24 to jury trial on facts supporting statute of limitations defense).

25 **I. ATTORNEYS’ FEES [L.R. 16-4.5]**

26 No party is seeking attorneys’ fees.

1 **J. ABANDONMENT OF ISSUES [L.R. 16-4.6]**

2 As discussed above, BitPay has abandoned each of its affirmative defenses
3 with the exception of the statute of limitations. Both Ox Labs and BitPay have
4 abandoned their claim for attorneys' fees. Ox Labs has abandoned its claim for
5 punitive damages.

6
7 Dated: October 28, 2019

Respectfully Submitted,
LEIDER + AYALA-BASS LLP

By: /s/ Philip. A. Leider
Philip A. Leider

Attorneys for Ox Labs Inc.

1 **IV. CERTIFICATE OF SERVICE**

2 I certify that counsel of record, listed below, is being served on October 28,
3 2019, with a copy of this document through the CM/ECF Filing System as identified
4 on the Notice of Electronic Filing dated October 28, 2019.

5 _____
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